Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local	)	
Exchange Carriers	)	
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications	)	CC Docket No. 96-98
Act of 1996	)	
	)	
Deployment of Wireline Services	)	
Offering Advanced Telecommunications	)	CC Docket No. 98-147
Capability	)	

REPLY COMMENTS OF XO COMMUNICATIONS, INC.

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Summary

The Commission must continue to require the mandatory unbundling of loops, high-capacity loops and dedicated transport network elements. Very little has changed with regard to the critical need of competitors to have unbundled access to these UNEs since the Commission issued its UNE Remand Order and rebuffed the efforts of the Bell Operating Companies to remove high-capacity loops and transport from the Commission's list of required UNEs. The Commission's prior findings should therefore not be disturbed in this *Triennial Review*.

As the comments in the proceeding make clear, non-ILEC alternatives do not exist for loops, high-capacity loops and dedicated transport facilities. In light of the significant reductions in the network deployment of CLECs resulting from the current financial climate, CLEC self-provisioning is not a viable alternative to ILEC high-capacity UNEs. Further, contrary to the position of the ILECs, special access is not a competitive alternative to high-capacity UNEs. In addition to the significant cost differential between UNEs and special access services, special access services are not subject to scrutiny under the Section 271 process and, to date, have not generally been subject to important performance measurements, standards and penalties applicable to UNEs.

The ILECs are still the only game in town when it comes to high-capacity loops and transport and the Commission must preserve competitive access to those UNE facilities. Without continued mandatory unbundling of loops, high-capacity loop and dedicated transport network elements, CLECs will be gravely impaired in their ability to compete and, in the end, consumers will suffer.

The Commission must also wholly disregard the ILECs' argument that CLECs purchase few high-capacity UNEs and therefore do not need unbundled access to such facilities. What the

ILECs fail to disclose is that it is the ILECs' anticompetitive schemes that make it difficult for CLECs to purchase high-capacity UNEs and that have forced CLECs – against their will – to instead purchase the more expensive special access facilities from ILECs. The Commission should also heed the call of the state public utility commissions to retain the Commission's existing rules that allow state commissions to add to the minimum list of UNEs and adopt policies that are consistent with the Act.

The Supreme Court's *Verizon* decision and the Commission's Petition for Rehearing of the D.C. Circuit's *USTA* decision also call for the preservation of the Commission's UNE list, including the continued unbundling requirement of high-capacity loops and transport, as well as the ability of CLECs to obtain direct access to combinations of elements, including EELs. The Commission must heed the Supreme Court's mandate to enforce to the fullest extent possible the pro-competitive aspects of the Act, including the fundamental obligation of the incumbents to unbundle network elements. Moreover, because the Commission petitioned for rehearing of the *USTA* decision on the grounds that the decision is "fundamentally in tension" with the Supreme Court's *Verizon* decision, the Commission must not undertake any action in this *Triennial Review* that would jeopardize the basis for its pending Petition for Rehearing. The Commission must therefore maintain the national UNE list intact for purposes of this proceeding. Assuming, *arguend*o, that the *USTA* decision is controlling in this proceeding, the continued national unbundling of loops, high-capacity loops and transport would survive even under a *USTA* "local market" test and cost analysis, as a competitor is impaired without access to these UNEs even under the narrowest interpretation of "impairment."

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In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)))))	CC Docket No. 01-338
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	))))	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)))	CC Docket No. 98-147

REPLY COMMENTS OF XO COMMUNICATIONS, INC.

Pursuant to the Order of the Federal Communications Commission (the "Commission"), DA 02-591, released March 11, 2002, and DA 02-1291, released May 30, 2002, XO Communications, Inc. ("XO") respectfully submits this reply to the comments filed on April 5, 2002, regarding the Commission's *Triennial Review Notice*[1] in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

The record in this proceeding reflects overwhelming support for retaining loops, high-capacity loops and transport as unbundled network elements ("UNEs") that must be provided by the incumbent local exchange carriers ("ILECs") pursuant to the mandatory unbundling obligations of Section 251(c)(3) of the Telecommunications Act of 1996 (the "Act").[2] Not

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[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 01-361, Notice of Proposed Rulemaking (rel. Dec. 20, 2001) ("*Triennial Review Notice*").

[2] 47 U.S.C. § 251(c)(3).

surprisingly, the only parties that oppose the continued unbundling of loops, high-capacity loops and transport are the ILECs and their trade association, the United States Telecom Association ("USTA").[3] In support of their position, USTA and the ILECs rely on the "2002 Fact Report." The Report is an unsworn hodgepodge of distorted facts and figures. The 2002 version of the Fact Report is no more persuasive or accurate than the flawed "Fact Report" to which the ILECs and USTA referred in the *UNE Remand* proceeding[4] and the *Joint Petition* to eliminate high-capacity loops and transport from the UNEs list.[5] The 2002 Fact Report is merely a rehash of the previous Fact Report, and the citations and figures referenced in the 2002 Fact Report differ only slightly from the older report. The criticisms leveled by XO and others at the previous Fact Report are equally valid with respect to the current iteration which, like its predecessor, is a weak collection of manipulated statistics.[6]

Very little has changed with regard to the critical need of competitors to have access to a complete list of unbundled elements since the Commission issued its *UNE Remand Order* in 1999 or since the Commission last year rebuffed the *Joint Petition* of the Bell Operating Companies ("BOCs") to remove high-capacity loops and transport from the Commission's list of

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[3] *See generally, e.g.,* Comments of the United States Telecom Association ("USTA Comments"), Comments of SBC Communications, Inc. ("SBC Comments"), Comments of BellSouth Corporation ("BellSouth Comments"), Comments of Qwest Communications International Inc. ("Qwest Comments") and Comments of Verizon Communications ("Verizon Comments").

[4] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

[5] *See* Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC Docket No. 96-98 (filed April 5, 2001) ("*Joint Petition*").

[6] *See*, *e.g.*, CC Docket No. 96-98, Comments of XO Communications, Inc. at 12-23 (June 11, 2001) ("XO High Cap Comments"); Comments of the Association of Local Telecommunications Services (June 11, 2001); Opposition of AT&T Corp. to Joint Petition at 8-9 (June 11, 2001); Covad Communications Company's Opposition to Joint Petition at 8 (June 11, 2001); Joint Comments of (cont.)

required UNEs. Indeed, the most marked change relevant to the *Triennial Review* is the greater dearth of competition for local exchange services, including broadband services. Competitive local exchange carriers ("CLECs") have disappeared quickly as a result of sweeping market changes coupled with costly, time-consuming BOC intransigence in meeting their obligations under the law. Accordingly, the same arguments in favor of preserving high-capacity loops and transport set forth by the CLECs and the state commissions in their comments in the *UNE Remand* and *Joint Petition* proceedings are even more compelling today.

The comments in this proceeding clearly demonstrate the dominant control that the ILECs continue to exercise over loops, high-capacity loops and dedicated transport. In most cases, competitive alternatives to such elements do not exist, and the ILECs remain the only source for those items. Without continued mandatory unbundling of the loop, high-capacity loop and dedicated transport network elements, CLECs will be gravely impaired in their ability to provide local telecommunications service. Competition cannot exist without unbundled access to loop, high-capacity loop and transport network elements, and, in the end, consumers will suffer.

The recent Supreme Court's *Verizon* decision[7] lends even greater support for the Commission to preserve the availability of UNEs, including loops and high-capacity loops and transport. In *Verizon*, the Supreme Court unequivocally affirmed the Commission's mandate to implement the pro-competitive aspects of the Act by adopting policies designed to give

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Allegiance Telecom, Inc. and Focal Communications Corporation at 18-24 (June 11, 2001).

[7] *See Verizon Communications, Inc. v. Federal Communications Comm'n*, 122 S. Ct. 1646 (2002) (upholding the Commission's pricing and combination rules as reasonable policy under *Chevron*, 467 U.S. 837 (1984) and *Hope Natural Gas*, 320 U.S. 591 (1944)) ("*Verizon*").

competitors every possible incentive to enter the local markets, short of confiscating the incumbent's property.[8] Given the critical competitive importance of the local loop, high-capacity loops and transport UNEs, the Commission should not deter competitive growth in local exchange services by revising its current unbundling requirements for these facilities. Rather, with firm support for its broad regulatory authority detailed in the Supreme Court's decision, the Commission should press forward to encourage competition by preserving the list of available UNEs, including high-capacity loops and transport. Further, in light of the Supreme Court's decision, the Commission should reaffirm that ILEC intransigence regarding the provisioning of UNE combinations will not be tolerated.

The D.C. Circuit Court's *USTA* decision[9] does not alter this result. As recognized by the Commission in its *Petition for Rehearing*,[10] the *USTA* opinion is wholly at odds with the fundamental policy findings and pro-competitive mandates of the Supreme Court's prior *Verizon* decision. Accordingly, the *USTA* decision should be deemed of no probative value in this proceeding. In addition, the continued national unbundling of loops, high-capacity loops and transport would survive even under a *USTA* "local market" test and cost analysis. As there is no non-ILEC alternative or intermodal competition for these facilities in any market, and duplicating such facilities is prohibitively expensive, a competitor is "impaired" without access to these UNEs under even the narrowest interpretation of "impairment."

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[8] 122 S. Ct. at 1661.

[9] *United States Telecom Ass'n v. Federal Communications Comm'n,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*").

[10] *United States Telecom Ass'n v. Federal Communications Comm'n*, Nos. 00-1012, *et al*. & 00-1015, *et al*., Petition for Rehearing or Rehearing *En Banc* (filed July 8, 2002) ("*Petition for Rehearing*").

II. DISCUSSION

A. The Supreme Court Has Affirmed the Pro-Competitive Structure of the Act, Thereby Mandating the Continued Unbundling of Loops and Transport and the Right of CLECs to Obtain Combinations of UNEs, Including EELs.

The recent Supreme Court *Verizon* decision affirms the Commission's mandate to adopt policies designed to promote competition in the local exchange market, including the Commission's prerogative to require the unbundling of elements necessary to implement the pro-competitive benefits of the Act.[11] The Supreme Court recognized Congress' goal in enacting the Act of "uprooting the monopolies" and giving "aspiring competitors every possible incentive to enter the local retail telephone markets, short of confiscating the incumbents' property."[12] In order to implement the competitive marketplace envisioned by Congress and recognized by the Supreme Court, the Commission must continue to require ILECs to unbundle and make available pursuant to Sections 251 and 252 of the Act loops, high-capacity loops, and dedicated transport, which will otherwise be too difficult – and inefficient – for entrants to replicate. The Commission's failure to do so will foster the entrenchment rather than the "uprooting" of the monopolies by depriving would-be competitors of the primary tools needed to compete.

In its decision, the Supreme Court noted that "it is easy to see why a company that owns a local exchange [] would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment."[13] The Court explained further that "a newcomer could not compete with [an ILEC] to provide local service without coming close to replicating the incumbent's entire

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11 122 S. Ct. at 1661.
12 *Id.*
13 *Id*. at 1662.

existing network, *the most costly and difficult part of which would be laying down the "last mile" of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses*."[14] The Supreme Court further upheld the FCC's right to require carriers "to share some facilities that are very expensive to duplicate (say, loop elements) . . ." given that "competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements jointly necessary to provide a desired telecommunications service."[15] The Court recognized that the Act allows entrants to lease some "unnecessarily expensive" elements, which is "the reality faced by the hundreds of smaller entrants . . . seeking to gain toeholds in the local exchange markets."[16]

The Supreme Court clearly vests the Commission with the authority – indeed the obligation – to enforce to the fullest extent possible the pro-competitive aspects of the Act, including the fundamental obligation of the incumbents to unbundle network elements. Indeed, given that this is twice that the Supreme Court has come down on the side of the pro-competitive structure of the Act,[17] the Commission must not fail to heed the Court's mandate. In light of the *Verizon* decision, the Commission cannot eliminate competitors' access to unbundled loops, including high-capacity loops, and transport, which are arguably the most vital parts of the

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14 *Id.* (emphasis added).

15 *Id*. at 1672, n. 27. As the Supreme Court recognized, "a policy promoting lower lease prices for expensive facilities unlikely to be duplicated reduces barriers to entry (particularly for smaller competitors) and puts competitors that can afford these wholesale prices . . . in a position to build their own versions of less expensive facilities that are sensibly duplicable." *Id*. at 1668, n. 20.

16 *Id*. at 1668, n. 20.

17 *See also AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 384-385 (1999) (upholding the Commission's jurisdiction to impose a new methodology on the states when setting interconnection rates) ("*Iowa Utilities Board*").

ILECs' networks.[18] Without unimpeded access to loops, high-capacity loops and transport as UNEs as envisioned by the Act, CLECs will be unable to compete and will therefore be driven to extinction.

The Supreme Court's decision also provides the Commission with timely guidance that eliminates any issue related to the ability of CLECs to obtain access to combinations of elements, including enhanced extended links ("EELs"). In upholding the FCC's additional UNE combination rules, 47 C.F.R. §§ 51.315(c)-(d), which require the ILECs to combine UNEs, even if those elements are not ordinarily combined in the incumbent's network, and to perform functions necessary to combine the UNEs it provides with elements owned by the requesting carrier "in any technically feasible manner," the Supreme Court held that the "additional combination rules reflect a reasonable reading of the statute, meant to remove practical barriers to competitive entry into local-exchange markets …."[19] The Supreme Court further found the UNE combination rules "consistent with the Act's goals of competition and non-discrimination and impos[ed] in a sensible way to reach the result the statute requires."[20]

As the Supreme Court has unequivocally affirmed the right of competitors to obtain combinations of UNEs from ILECs, CLECs are therefore clearly permitted to order EELs directly from the ILECs, without having to first order special access facilities and undertake the

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[18] Deleting local loops from the list of required UNEs would destroy local exchange competition by eliminating a key element required to compete, and it would eliminate one of the central obligations of the ILECs under the Act. As the Supreme Court noted in *Verizon*, local loop plant makes up at least 48 percent of the elements the ILECs will have to provide to competitors. *See* 122 S. Ct. at 1677.

[19] 122 S. Ct. at 1685.

[20] *Id*. at 1687. As the Court explained, "[i]f Congress had treated incumbents and entrants as equals, it probably would be plain enough that the incumbents' obligations stopped at furnishing an element that could be combined[; however, the Act] proceeds on the understanding that incumbent monopolists and contending competitors are unequal." *Id*. at 1684.

painstaking and anti-competitive process established by the ILECs for converting the special access facilities to UNEs. New circuit EEL conversions from special access to UNE pricing is, by law, a thing of the past. But the history of EEL conversions demonstrates that the Commission must make clear in this proceeding that the CLECs' right to EELs and the ILECs' obligation to provide such combinations will not be circumvented by further ILEC gamesmanship. ILECs have long engaged in anti-competitive practices that deny CLECs access to combinations of UNEs and force them to purchase special access services. In light of the *Verizon* decision, CLECs should be able to order loop and transport UNEs – in combination or otherwise – in accordance with the pro-competitive framework envisioned under the Act. It is now up to the Commission to affirmatively state that those vital network elements remain available to the CLECs on an unbundled, non-discriminatory basis.

Despite the clear pro-competitive mandate of the Supreme Court, within just weeks of the *Verizon* decision, a panel of the United States Circuit Court of Appeals for the District of Columbia rendered the *USTA* decision, an opinion that is wholly at odds with the Supreme Court's *Verizon* decision. In the *USTA* decision, the panel of the D.C. Circuit found fault with and remanded to the Commission its national unbundling rules which, the panel found, fail to take into consideration any local market conditions and associated wide-ranging costs that may affect the "impairment" analysis.[21] In stark contrast to the V*erizon* ruling, where the Supreme Court upheld the Commission's prerogative to give "aspiring competitors every possible incentive to enter the local retail telephone markets, short of confiscating the incumbents'

[21] 290 F.3d at 422 (holding that as a result of the national, uniform rule, "UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment . . . ")

property,"[22] the *USTA* panel adopts a very dim view of competitive entry via the leasing of UNEs, even labeling such entry "synthetic competition."[23]

Indeed, it is this very conflict between the *Verizon* and the *USTA* decisions that resulted in the Commission's *Petition for Rehearing* of the *USTA* decision. As noted by the Commission in its *Petition for Rehearing*, the *USTA* panel's discussion "of the effect of UNE availability and pricing is, at a minimum, fundamentally in tension with the Supreme Court's decision in *Verizon* and the general principles of *Chevron* review.[24] For instance, in its *Petition for Rehearing*, the Commission points out that where the Supreme Court found that "the Commission could reasonably conclude that network element unbundling at rates set in accordance with TELRIC would encourage investment" by incumbents and new entrants,[25] the *USTA* panel assumed that network element unbundling requirements necessarily will create investment disincentives for both types of carriers.[26] As the Commission made clear, "[a]lthough the Supreme Court's [analysis] in *Verizon* arose on review of TELRIC pricing for UNEs rather than of the FCC's standards for specifying required UNEs, the underlying analysis is the same" because "rates do not exist in isolation [but, rather,] they have meaning only when one knows the services to which

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22 122 S. Ct. at 1661.

23 290 F.3d at 424.

24 *Petition for Rehearing* at 7 (citing the limited role of reviewing courts under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843-45 (1984), particularly in cases involving disputed economic arguments and complex technical and regulatory background). The Commission argues that the *UST*A panel overstepped the bounds of proper judicial review by reading section 251(d)(2) to curtail the Commission's discretion on the basis of virtually the same highly contested economic assumptions that the Supreme Court in *Verizon* had held not to foreclose the availability of UNEs at prices based on TELRIC costs. *Petition for Rehearing* at 2.

25 122 S. Ct. at 1668, n. 20, 1672. n. 27, 1665-76 & n. 33.

26 *Petition for Rehearing* at 8-9 (*citing* 290 F.3d at 427).

they are attached."[27] The Commission also seeks rehearing on the grounds that the *USTA* panel's discussion of relevant cost disparities and retail cross-subsidization conflict with provisions of the Act and the Supreme Court's *Iowa Utilities Board* decision.[28]

Given that the *USTA* court's fundamental approach to competition and the underlying importance of the unbundling obligation to the promotion of local exchange competition wholly conflicts with the Supreme Court's findings in *Verizon*, the *USTA* decision should be deemed of no probative value for purposes of this proceeding. Further, the Commission should not undertake any action in this proceeding that would jeopardize the basis for its pending *Petition for Rehearing*. The Commission should therefore maintain the national UNE list intact at least until such time as its *Petition for Review* is acted on in the appropriate judicial forum.

Further, a*ssuming*, *arguendo*, that the *USTA* decision is controlling in this proceeding, even under the *USTA* court's analysis, the Commission must continue to require the unbundling of loops, high-capacity loops and transport on a national basis. As is demonstrated herein, a non-ILEC substitute for loops, high-capacity loops and dedicated transport does not exist anywhere in the country, and the costs associated with duplicating loop and transport facilities would be prohibitive.[29] Yet, these network elements are undeniably fundamental to the ability of CLECs to offer services and compete. Accordingly, even under a *USTA* analysis, loops, high-capacity loops and transport must continue to be provided on an unbundled basis to competitors on a national basis as competitors would otherwise surely be "impaired" in any locality under even the most narrow definition of the term.

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27 *Id.* at 9.

28 *Petition for Rehearing* at 11-15.

29 *See* 122 S. Ct. at 1668, n. 20 (competitors cannot be required to duplicate expensive facilities, (cont.)

B. Loops, High-Capacity Loops and Dedicated Transport Must Continue to be Available on an Unbundled Basis.

In essence, the ILECs argue that the CLECs have adequate market presence and access to alternative network element sources to justify eliminating UNE loops, including high-capacity loops, and dedicated transport from the list of UNEs required to be unbundled under Section 251(c)(3) of the Act.[30] Indeed, USTA and the ILECs would have the Commission believe that ILEC-provided high-capacity loops and transport are no longer needed by CLECs to serve end users.

These arguments defy reality. Since the release of the *UNE Remand Order* and the submission of comments in response to the ILECs' *Joint Petition* to eliminate from the list of UNEs high-capacity loops and dedicated transport, nothing has changed to merit a reversal in the Commission's position regarding the unbundling of loops, including high-capacity loops, and dedicated transport. The rationale behind the Commission's decision in the *UNE Remand* proceeding holds true today.

Today, as much as when the Commission released its *UNE Remand Order*, "requiring carriers to self-provision loops would materially raise entry costs, delay broad-based entry, and limit the scope and quality of the competitor's offerings."[31] Further, it would be "prohibitively expensive and delay competitive entry" for CLECs to have to "replicat[e] an [ILEC's] vast and ubiquitous network."[32] Moreover, failure to provide CLECs with unbundled access to loops,

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such as loops).

[30] *See* BellSouth Comments at 60-63 and 90-101; Qwest Comments at 6 and 32-34; SBC Comments at 1-2, 84-90 and 100-101; USTA Comments at 6; Verizon Comments at 9-20.

[31] *UNE Remand Order* ¶ 181.

[32] *Id.* ¶ 182.

high-capacity loops and transport would "delay, if not prohibit, market entry and postpone, perhaps indefinitely, the benefits of telephone competition for consumers."[33] Indeed, the lackluster financial conditions surrounding the financial well-being of the CLECs support the notion that loops, high-capacity loops and dedicated transport should continue to be available on an unbundled basis.

The ILECs' attempts to show that CLECs no longer need access to ILEC high-capacity UNEs is nothing more than gamesmanship employed for the purpose of allowing the ILECs to shirk their obligations under the Act. The Commission's reasoning in the *UNE Remand Order* remains sound and, for the reasons set forth herein, the ILECs' rehashed arguments should be soundly rejected.

1. The ILECs' data fail to reveal that the ILECs' anti-competitive games reduce the availability of high-capacity UNEs as the ILECs attempt to force CLECs into purchasing more expensive special access facilities.

In an effort to demonstrate that CLECs do not need access to high-capacity facilities, the ILECs claim that CLECs purchase few high-capacity facilities from ILECs. For instance, Verizon claims that CLECs have purchased only 12,300 DS-1 UNEs from Verizon, only 60 DS-3 UNEs, and not a single unbundled loop of greater than DS-3 capacity.[34] Similarly, relying on the so-called "Fact Report," SBC asserts that CLECs have purchased only 72,000 high-capacity loops, of which all but 140 are DS-1 loops.[35] The ILECs therefore claim that CLECs do not need access to high-capacity loops, particularly loops of greater than DS-1 capacity.[36]

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33 *Id.*

34 Verizon Comments at 11.

35 SBC Comments at 100.

36 *See also* Bell South Comments at 61-62 (CLECs purchase few high-capacity loops from ILECs and use their own last mile facilities in BellSouth territory).

What the ILECs fail to disclose, however, is that they have developed practices that have the effect of discouraging CLECs from purchasing high-capacity UNE facilities and force such CLECs, in order to serve their customers, to purchase the more expensive ILEC special access services. Accordingly, the ILECs' data on the number of high-capacity UNEs purchased by CLECs completely misrepresents the CLECs' need for access to ILEC high-capacity facilities.

For instance, ILECs – most notably Verizon – routinely reject CLEC high-capacity loop and transport orders by claiming, without adequate proof or explanation, that facilities are "unavailable."[37] As set forth in the ALTS Comments, Verizon implemented new practice and procedures relating to DS-1, DS-3 loops and other UNEs that support the rejection of a high percentage of high-capacity UNE orders for the reason of "no facilities."[38] Indeed, Verizon's "no facilities" policy – which permits Verizon to plead "no facilities" even when only a trivial change to the UNE may be required – in some instances has led to a 60% rejection rate for high-capacity loop orders.[39] Verizon's actions have therefore resulted in a significant decline in the number of DS-1 and DS-3 loops available to CLECs.[40] Unlike what the ILECs would have the Commission believe, CLECs are ordering high-capacity UNE facilities, the ILECs are just refusing to accept and complete the orders. Accordingly, Verizon's claim that CLECs purchase a low volume of high-capacity UNEs should be wholly ignored or viewed solely as a

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37 *See* Comments of ALTS, Cbeyond, DSLNet, El Paso, Focal, New Edge, Pac-West, Paetec, RCN and US LEC ("ALTS Comments") at 103-117; Comments of WorldCom, Inc. ("WorldCom Comments") at 24 and 81.

38 ALTS Comments at 104-107.

39 *Id*. at 105-107.

40 *See also* WorldCom Comments at 24 ("[b]y using "no facilities" as a pretext to reject a significant percentage of orders, the ILECs preclude CLECs from relying on unbundled elements as a service delivery mechanism").

consequence of Verizon's own anti-competitive behavior, not as the absence of the need for CLEC access to unbundled high-capacity loop and transport UNEs.

Verizon attempts to defend its anti-competitive actions by relying on an overly-restrictive and untenable interpretation of the Eighth Circuit holding.[41] Under Verizon's theory, it claims that it is not required to offer facilities as UNEs if such unbundling would require the slightest modifications to its network, including augmenting electronics or installing a simple line card, as doing so would be tantamount to forcing an ILEC to construct a "superior quality network" on behalf of the CLECs. Contrary to Verizon's position, CLECs are not asking Verizon to build a superior quality network in order to provide high-capacity UNEs to CLECs but, instead, are merely requesting that Verizon provide unbundled access to the same network over which ILECs provide special access, DS-1, DS-3, OCN, and similar services to their own customers.[42] Verizon has therefore put forth no credible legal position to support its "no facilities" policy.[43]

The reason for Verizon's legal gymnastics is clear: by routinely rejecting CLEC orders for high-capacity loops and transport, the ILECs can force CLECs to purchase special access service at the more expensive retail rates in order to serve their customers. That is,

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41 *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part on other grounds sub nom. AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

42 120 F.3d 753 at 812-813 ("[a]lthough we strike down the Commission's rules requiring [ILECs] to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to [ILEC] facilities to the extent necessary to accommodate interconnection or access to network elements'").

43 Indeed, when other ILECs have attempted to engage in the same anticompetitive behavior, the relevant state commissions established a definition of "no facilities" to combat the ILEC's unsustainable position. *See*, *e.g.*, *In the Matter of Complaint of BRE Communications, L.L.C., d/b/a Phone Michigan for violations of the Michigan Telecommunications Act,* Case No. U-11735, February 9, 1999, and *Illinois Commerce Commission On Its Own Motion v. Illinois Bell Telephone Company Investigation of Construction Charges,* Docket 99-0593*,* August 15, 2000 (both state commissions concluded that the ILEC's unbundling obligations include the requirement to perform some construction to provision the (cont.)

notwithstanding Verizon's refusal on the basis of "no facilities" to provide the high-capacity UNE facilities ordered by CLECs, Verizon will "build" the necessary facilities if the requesting CLEC withdraws its UNE order and submits an order for the same circuits as a special access service.

Similarly, SBC has undertaken a campaign designed to encourage CLECs to purchase special access, rather than high-capacity UNEs, by informing CLECs that combinations of UNEs are inferior to special access service. In response to a request by XO to discuss problems with the existing access-to-EEL conversion orders submitted by XO, SBC personnel delivered the attached PowerPoint presentation to XO CLECs entitled "Special Access vs. UNEs, Does it Really Add Up?" (*See* Exhibit 1, attached hereto). In the presentation, SBC touts the shorter installation and repair intervals, service level guarantees, and performance credits and discount plans associated with special access service, but not UNEs, and asks the question "why pay for a lesser quality service?" In fact, SBC's material indicates that it will provide additional discounts for its special access service to carriers "who are considering flipping their access circuits to UNEs." Clearly, SBC is not concerned with whether CLECs are obtaining the best quality service for their money, but is intent on maintaining the high revenue stream from CLECs associated with their purchase of special access facilities. Not only does SBC's presentation demonstrate that SBC unlawfully discriminates against its wholesale UNE customers by providing superior service to its retail, special access customers in violation of the Act, it also makes evident the great lengths that SBC will go to deprive its competitors of the TELRIC-

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requested UNE).

priced UNEs to which competitors are entitled in order to maintain the "gravy train" associated with the CLECs' purchase of special access services.

The ILECs should not be permitted to turn their "no facilities" ruse and other marketing schemes into a means to deprive CLECs of the high-capacity UNEs they need or, alternatively, to force CLECs to purchase more expensive special access facilities. The Commission should therefore wholly disregard the ILECs' contentions that CLECs do not order high-capacity UNE loops and transport and establish reasonable parameters for the ILECs' use of the "no facilities" exception.

In addition, ILECs adopt an out-of-date and therefore under-inclusive definition of "high-capacity" loops, which also limits the number of high-capacity loops available to CLECs. Pursuant to Commission rules, the local loop "includes, but is not limited to, DS1, DS3, fiber and other high-capacity loops."[44] In addition, dedicated interoffice transport is defined to include "all technically feasible capacity-related services including, but not limited to, DS1, DS3 and OC-N levels …."[45] Notwithstanding the Commission's apparent desire to maintain a sufficiently flexible definition of high-capacity facilities to account for inevitable technological advances and increased consumer demand for higher bandwidth, the ILECs only make available on reasonable terms the most basic of the "high-capacity" facilities, such as DS-1 loops. While DS-1 and DS-3 loops may have been considered "high capacity" end-user loops several years ago, these loops have become the standard loops desired by most small businesses. Indeed, XO's cross-over point from a DS-1 loop to a DS-3 loop is typically 7-10 lines, a line count held by many small businesses. DS-3, OC-3 and higher capacity loops have become the true "high-capacity" loops,

[44] 47 C.F.R. § 51.319(a)(1).

yet ILECs do not make these available except under terms that make it too difficult to purchase them, such as requiring special construction. Again, the Commission should wholly disregard the ILECs' data and should make clear the ILECs' obligation to provide to CLECs on a non-discriminatory basis the high-capacity UNEs that CLECs need to provide their services, including DS-3 and OC-N facilities.[46]

In addition, the Commission's loop-transport combination (EEL) restrictions – principally, the ban on "commingling" and "significant amount of local traffic" requirement – have been exploited by the ILECs to deny access to the EEL, thereby limiting the usefulness of the availability of high-capacity UNEs. Like the ILECs' "no facilities" game, the "commingling" ban has the practical effect of forcing the CLECs to purchase more expensive special access services in order to provide local service.[47] Because CLECs are restricted in combining a UNE loop with a retail service, they are oftentimes required to purchase ILEC special access service in order to serve a customer. Again, the Fact Report and ILEC data fail to tell the real story.[48]

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[45] 47 C.F.R. § 51.319(d)(1)(i).

[46] *See also* Comments of NuVox, KMC Telecom, e.spire, TDS Metrocom, MFN and SNiP LiNK at 93-94 (the Commission must remedy the ILECs' perception that SONET is exempt from its unbundling requirements)("Comments of NuVox").

[47] *See* AT&T Comments at 157 (because the Commission's "interim" use and commingling restrictions effectively deny CLECs access to the unbundled loop-transport combinations, CLECs are forced to purchase ILEC special access).

[48] Although the "commingling" ban for EELs is a "dead" issue after the Supreme Court's *Verizon* decision, which affirmed the unfettered right of CLECs to obtain combinations of UNEs, it is addressed herein as it affects the data relied upon by the ILECs in this proceeding and their position that the Commission should eliminate high-capacity UNE facilities from the unbundling obligations under the Act. Moreover, if, for some reason, the "commingling" ban is still in effect, the FCC must be extremely wary of eliminating *any* high-capacity loops from the UNE list. For instance, if DS-3 and higher capacity circuits are eliminated from the UNE list, the effect of the commingling restriction is to make all lower-capacity facilities, including DS-1 and DS-0 UNEs, ineligible because a CLEC would be unable to (cont.)

In addition, BellSouth is exploiting the limited "safe harbor" audit process established by the Commission in the *Supplemental Order Clarification*[49] by routinely subjecting CLEC EEL requests – both special access-to-EEL conversion requests and new EEL requests – to a BellSouth audit. As set forth by XO and others in their *Joint Comments*[50] in support of the recent Petition for Declaratory Ruling of NuVox, Inc. related to this issue,[51] BellSouth's conduct is unlawful and a competitive barrier to entry. In its *Supplemental Order Clarification*, the Commission made clear that audits should not be undertaken routinely, but only when a legitimate concern arises regarding compliance with the safe harbors. The Commission did not extend the "local usage" constraint, and therefore the audit requirement, to new EELs. Accordingly, BellSouth's routine audit requests of EEL conversions and new EELs makes a mockery of the Commission's *Supplemental Order Clarification* and serves as a significant barrier to competitive access to UNEs. It also diminishes the ability of carriers to compete as they are forced to expend scarce resources to fend off the unlawful audit requests.[52]

In sum, assuming that CLECs have not purchased significant numbers of high-capacity loops and transport UNEs from ILECs, the reason is not the absence of the CLECs' need for the

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connect a DS-0 or DS-1 UNE with a DS-3 retail facility. As history makes clear, the ILECs will argue that the whole "UNE chain" must be eligible and any break in the chain – *i.e.*, any retail component – renders invalid the EEL.

[49] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd. 9587 (2000) ("*Supplemental Order Clarification*").

[50] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Docket No. 96-98, Joint Comments of Cbeyond Communications, LLC, ITC DeltaCom Communications, Inc., KMC Telecom Holdings, Inc., NewSouth Communications Corp. and XO Communications (filed July 3, 2002) ("*Joint Comments*").

[51] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Petition for Declaratory Ruling of NuVox, Inc. (filed May 17, 2002).

[52] *See Joint Comments* at 2-5.

high-capacity circuits but, rather, ILEC intransigence and circumvention. The ILECs must not be permitted to turn their own anti-competitive tactics into a perverse form of proof that, by depriving competitors of the high-capacity UNEs they need to offer their services, such services are not in demand. Instead, the Commission should heed CLEC statements that competitors both want and need high-capacity UNEs to compete and take steps to ensure that the ILECs' anti-competitive obstacles to UNE unbundling are removed.

2. There are no viable alternatives to ILEC-provided loops and high-capacity loops.

Despite the ILECs' unsupported and untenable claims that CLECs can serve the vast majority of customers using their own last-mile facilities[53] or available alternatives,[54] CLECs simply do not have any alternatives for ILEC-provided loops, high-capacity loops and transport in most instances.[55] As this Commission has previously recognized, the local loop is the most fundamental UNE.[56] Further, the Commission was correct when it determined in the *UNE*

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[53] *See* SBC Comments at 33 (it is both feasible and economical for CLECs to meet their transport needs through self-provisioning or third party suppliers); Verizon Comments at 11-17 (CLECs now serve the vast majority of their medium- and large- business customers using their own last mile facilities).

[54] *See* USTA Comments at 6 (there are sufficient alternative providers of high capacity loops so there is no need to rely on the ILEC UNE); Qwest Comments at 32 (CLECs have sufficient alternatives to the ILECs' unbundled facilities to justify removing dedicated interoffice transport from the unbundling requirements); BellSouth Comments at 61-64 (all markets for high-capacity loops are highly competitive and CLECs should lease excess capacity from wireline and wireless capacity wholesalers to provide business customers high-capacity loops through fiber to the building).

[55] *See*, *e.g.*, Comments of New York Department of Public Service ("New York DPS Comments") at 4-5 (noting that the local loop "is an essential facility that CLECs cannot economically self-provision or obtain from third-party vendors" and that "[w]hile wireless and cable alternatives are promising, they are not sufficiently available to constitute a substitute for the local loop"); Comments of Covad Communications at 70 (even in those rare circumstances where Covad has access to competitive transport, it is priced to be comparable to the ILEC's special access services); Comments of AT&T at 148 (market data show that CLECs do not have significant alternatives to the ILECs' fiber loop and transport facilities); Comments of NuVox at 88-89 (no changed circumstances have occurred that make transport more available from non-ILECs); ALTS Comments at 66 (ILEC pricing and provisioning of special access is strong evidence of the lack of alternatives to CLECs for high-capacity facilities).

[56] *See UNE Remand Order* ¶ 163 ("under any reasonable interpretation of the "necessary" and (cont.)

Remand Order that "[b]uilding out any loop is expensive and time-consuming, regardless of its capacity."[57] There are many customers that XO and other competitors "would like to serve but cannot because the cost of building the loop from the customer premises to the [CLEC's] switch is prohibitive."[58] Further, as recently reiterated by the Supreme Court in its *Verizon* decision, "the most costly and difficult [aspect of competing with ILECs and replicating the ILEC network] would be laying down the "last mile" of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses."[59]

Despite CLEC network buildouts, which are modest in comparison to the large ILEC networks, ILECs continue to possess overwhelming market power in the provision of loops.[60] By controlling local loop plant, the ILECs have the ability to limit terminal connections.[61] Loop buildouts by CLECs are duplicative and prohibitively costly.[62] Even where some CLECs have deployed fiber rings in metropolitan areas, those rings are not "last mile" facilities.[63] As the Supreme Court recently noted, for a network to have value it must connect more than a select handful of customers: "a mini-network connecting only some of the users in the local exchange would be of minimal value to customers."[64] Thus, to reach a particular customer, CLECs must

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"impair" standards of section 251(d)(2), loops would be subject to the section 251(c)(3) unbundling obligations"). *See also* ALTS Comments at 38-43.

57 *UNE Remand Order* ¶ 184.

58 *Id*.

59 122 S. Ct. at 1662.

60 *Id*. at 1677 (the local loop plant makes up at least 48 percent of the elements the ILECs will have to provide to competitors).

61 *Id*. at 1662.

62 *Id*. at 1668, n. 20. S*ee also* ALTS Comments at 40 (noting that a CLEC bears the full loss of its investment if it loses a customer after building out to that end user).

63 See XO High Cap Comments at 12-13, Declaration ¶ 5.

64 *Id*.

decide whether to build to the location or buy or lease facilities. Unfortunately, to the extent other CLECs and competitive providers own fiber rings in a metropolitan area, the rings typically overlap with the fiber of other carriers and provide no "last mile" connectivity.[65]

Further, the ILECs' claims that unbundling discourages CLEC investment are not valid. As the Supreme Court noted in *Verizon*, "actual investment in competing facilities since the effective date of the Act simply belies the no-stimulation argument's conclusion."[66] The only action certain to deter CLEC investment and hamper the growth of competition is an action by the Commission that removes loops, high-capacity loops and transport from the list of UNE obligations.

With regard to transport services, the ILECs are partially correct in stating that alternatives to ILEC-provided transport exist. The non-ILEC providers of such transport services, however, exist only on certain routes in select cities. They lack the ubiquity and size of the ILECs and cannot be relied upon in most cases to provide services. Unfortunately, the inventory of competitive alternatives to ILEC services is actually shrinking rather than growing, given the economic realities of the current financial markets. The uncertainty surrounding the continued operations of competitive providers creates a less-than-desired environment for relying on even the limited choice offered by non-ILECs.

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[65] *Id*. at 13, Declaration ¶ 11 (because many municipalities or local agencies require joint construction in a single trench, often CLECs and wholesale fiber provides ultimately end up installing fiber along the same routes). Similarly, ILEC and USTA claims regarding CLEC building penetration continue to be overstated. As commenters to the *Joint Petition* previously explained, numbers regarding buildings passed are double-counted in some cases, and in other instances, the numbers include "planned" network construction. Further, no distinction is made between buildings that are simply "passed" by a CLEC fiber ring and those that are actually "on net."

[66] 122 S.Ct. at 1669.

The ILECs also suggest – as if to provide the CLECs with some marketing and business advice – that a scaled and select marketing and entry strategy would serve the CLECs well.[67] The ILEC argument suggests that CLECs grow slowly and build out their networks by becoming niche players.[68] Such a proposal presents the warped and cynical view of competition held by the ILECs. Under the ILEC marketing strategy, competitive carriers would be reduced to mere edge players rather than full-fledged competitors in the telecommunications market.

3. Special access is not a competitive alternative to high-capacity facilities.

In a stunning argument, Qwest suggests that CLECs have a readily available alternative source for unbundled transport: ILEC-provided special access facilities.[69] Obviously, the ILECs have a tremendous incentive and desire to force CLECs to utilize the more expensive, non-TELRIC priced special access services. However, special access is not an alternative to the UNE facilities envisioned under the pro-competitive tenets of the Act. In addition to the significant cost differential between UNEs and special access services, special access facilities are not subject to scrutiny under the Section 271 process and thus far have not been generally subject to important performance measurements, standards and applicable penalties that apply to UNEs.[70] In addition, although the service might be indistinguishable to the end-user customer, the

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67 *See*, *e.g.*, Verizon Comments at 115 (stating that CLECs could serve a large number of high-volume customers with a targeted deployment of loop facilities).

68 *Id*.

69 Qwest Comments at 34-35.

70 Indeed, the ILECs continue to fight to exclude special access performance metrics. *See* Verizon New Jersey's Comments Regarding Proposed Special Access Metrics, Docket No. TX98010010, New Jersey Board of Public Utilities (filed June 27, 2002) ("Verizon NJ opposes adoption of any metrics relating to special access services and incorporation of such metrics into the Carrier to Carrier Guidelines").

operations support systems ("OSS") are different for special access and high-capacity UNE facilities, further enabling the ILECs to engage in anti-competitive practices.

Clearly, the ILECs are attempting to play a shell game by creating an artificial and anti-competitive distinction between special access and UNEs by suggesting that special access services are a widely available, competitive alternative to UNEs. The special access facilities referred to by the ILECs are indistinguishable from ILEC UNE loops and just as encumbered by ILEC monopoly power. As the New York Public Service Commission found in its recent special access metric proceeding, Verizon has a complete stranglehold on the special access services market in New York.[71] In New York City, for example, the New York Commission found that Verizon had 8,311 miles of fiber compared to the CLECs' total fiber miles of just a few hundred.[72] Further, the New York Commission found that Verizon's fiber network encompassed 7,364 buildings, versus less than 1,000 passed by the CLECs' total networks.[73] Due to such control over special access services, this Commission has refused to declare ILECs non-dominant in the provision of special access service, even after Phase II relief for pricing flexibility has been granted.[74]

In sum, CLECs tend to order special access only when the ILECs refuse to allow the purchase of UNEs, thereby forcing the CLECs to purchase the more expensive special access

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[71] *See* State of New York Public Service Commission, *Opinion and Order Modifying Special Services Guidelines for Verizon New York, Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, Case 00-C-2051, Case 92-C-0665, Opinion No. 01-1, at 7 (rel. June 15, 2001).

[72] *Id*. at 7.

[73] *Id*.

[74] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, (cont.)

services. The ILEC position that special access services are an alternative to UNEs is a disingenuous attempt to further entrench the ILECs in the local exchange market. By eliminating UNEs and forcing CLECs to use special access, the ILECs will be able to charge monopoly rates to a captive market of competitors and operate outside the purview of the market-opening regulations and competitive safeguards established by this Commission and the state PUCs.

4. CLEC self-provisioning is not a credible alternative to ILEC high-capacity facilities in the current financial climate.

USTA and the ILECs would have the Commission believe that CLECs are sufficiently numerous and their networks ubiquitous to serve their own need for high-capacity facilities and, therefore, CLECs are not reliant upon access to unbundled ILEC high-capacity UNEs. For instance, the ILECs claim that since the time of the *UNE Remand Order*, there has been a huge CLEC expansion in the top 150 MSAs.[75] USTA submits that CLECs have demonstrated an ability to expand their networks – and to self-provision high-capacity loops – to serve customers where customer demand dictates.[76] BellSouth claims that the number of local service providers increased 488% from 109 in 1996 to 532 in 2000,[77] while Verizon posits that this Triennial

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14 FCC Rcd 14221, ¶ 151 (1999), *aff'd WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[75] *See, e.g.,* Qwest Comments at 33 ("[s]ince the time of the UNE Remand Order, the number of CLEC fiber networks in the 150 largest MSAs – which contain 70 percent of the U.S. population – has grown from approximately 1,100 to nearly 1,800 . . . [t]oday, 91 of the top 100 MSAs are served by at least three CLEC networks").

[76] USTA Comments at 6.

[77] BellSouth Comments at 10.

review is taking place in more "diverse and competitive marketplace" where ILECs are merely "minor players" in the broadband market.[78]

These statements defy credulity. To the extent the ILECs attempt to indicate growth in the number of CLECs in the top 150 MSAs, the ILECs' charts and conclusions belie the fact that the general collapse of the country's technology sector has caused most CLECs to suspend their expansion plans and to actually contract their service offerings by withdrawing from many markets and suspending less profitable product lines. As explained by ALTS in its initial comments, "the downturn in the telecommunications industry and the closing of capital markets suggests that a competitive market for loops is far in the future … CLECs will not be able to convince investors to sink significant amounts of capital into duplicating ILEC facilities, and directing limited capital resources to such a task would be wasteful and inefficient."[79]

Moreover, many CLECs themselves have disappeared or have filed for bankruptcy protection in the last year.[80] As recently chronicled in the *Wall Street Journal*, the number of

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[78] Verizon Comments at 7.

[79] ALTS Comments at 42. *See also* Comments of NuVox at 89-90 (self-provisioning is not realistic in light of the current capital crunch, which is also affecting competitive transport vendors); Comments of the California Public Utility Commission at 5 (CLECs have less access to capital than they did a short time ago); AT&T Comments at 142 (the prevailing financial conditions have also had a severe and extremely negative impact on the CLECs' ability to provide service in competition with ILECs).

[80] *See, e.g.,* XO High Cap Comments at 18, n.57 (citing bankruptcy announcements for many CLECs, including e.spire, Teligent, Network Access Solutions, Winstar, BroadBand Office, PSINET, NorthPoint, Rhythms and Urban Media). In addition, several CLECs have filed for bankruptcy since XO submitted those comments, including, but not limited to the following:

Global Crossing—http://news.com.com/2100-1033-824135.html—"Global Crossing files for bankruptcy," Reuters ("Global Crossing struggled with the debt incurred from building its global network…") (Jan. 28, 2002);

Verado Holdings—http://biz.yahoo.com/djus/020219/200202190908000276_5.html—"Verado Holdings Files for Chapter 11 Bankruptcy in Del.," Dow Jones Newswire (Feb. 19, 2002);

Net2000— http://dc.internet.com/news/article/0,1934,2101_925661,00.html—"Net2000 Files for Bankruptcy," Roy Mark, dc.internet.com (Nov. 19, 2001);

Yipes— http://www.redherring.com/vc/2002/0326/032602-yipes.html—"Yipes calls it quits: (cont.)

CLECs has met a sharp decline since 1999, falling from just under 400 CLECs in 1999 to well under 100 CLECs in 2001.[81] The more "diverse and competitive marketplace" envisioned by Verizon is therefore nothing more than rhetoric advanced to promote the ILECs' agenda of deregulation.

Indeed, as of June 30, 2001, CLECs served only nine percent (9%) of the 192 million switched access lines nationwide.[82] With respect to advanced services, such as ADSL high-speed lines, ILECs possess a higher share of the market. In its *High-Speed Services Report*,[83] the Commission reported that "[a]mong entities that reported facilities-based ADSL high-speed lines in service as of June 30, 2001, about 93 percent of such lines were reported by [ILECs]."[84]

The high-profile communications startup has filed for bankruptcy," Om Malik, RedHerring ("The news of Yipes's reorganization comes on the heels of rival Sigma Networks' liquidation. And earlier this month, Metromedia Fiber Network indicated that it was contemplating bankruptcy.") (March 26, 2002);

Mpower—http://www.convergedigest.com/Mergers/financialarticle.asp?ID=2745—"Mpower Files for Chapter 11 – Another CLEC Bankruptcy," Converge Network Digest (Feb. 26, 2002);

Network Plus—http://www.nwfusion.com/news/2002/0205nplus.html—"Network Plus files for bankruptcy," Michael Martin, NetworkWorldFusion (Feb. 05, 2002);

McLeodUSA—http://news.com.com/2100-1033-854023.html—("McLeodUSA sells phone unit service," Sam Ames, CNET News.com, ("Struggling telecom carrier McLeodUSA announced [] that it will sell its CapRock Services subsidiary – a unit that it bought just over a year ago – to an investor group. The company filed for bankruptcy this year along with other upstart telecom companies such as Global Crossing and Network Plus…") (March 6, 2002);

Adelphia Business Solutions—http://www.isp-planet.com/cplanet/news/03march2002/28adelphia.html—"Adelphia Commences Voluntary Chapter 11," Wayne Kawamoto, CLEC-Planet (March 28, 2002).

XO Communications – http://www.washingtonpost.com/wp-dyn/articles/A62661-2002Jun17.html?referer=email; "XO Communications Files for Chapter 11," Washington Post (June 17, 2002).

[81] See "Supreme Court Upholds FCC Rules Forcing Network-Leasing Discounts," Y. Dreazen, *The Wall Street Journal* (May 20, 2002).

[82] *See Local Telephone Competition: Status as of June 30, 2001*, Industry Analysis Division, Common Carrier Bureau (rel. Feb. 27, 2002) at 1.

[83] *See High-Speed Services for Internet Access: Subscribership as of June 30, 2001* (rel. February 2002) ("*High-Speed Services Report*").

[84] *Id.*

In sum, the ILECs' arguments that the marketplace has changed such that CLECs have adequate market presence and access to alternative network element sources to justify eliminating high-capacity loops and transport is defied by reality. The ILECs are still the only game in town when it comes to high-capacity loops and transport and the Commission must preserve competitive access to those UNE facilities.

C. The Commission Should Heed the Call of the State Commissions to Preserve the UNE List as a Floor Upon Which the States May Build.

Even prior to the *USTA* decision, NARUC and the state commissions were unanimous in their position that the Commission must retain its existing rules that allow state commissions to add to the minimum list of UNEs[85] and adopt policies that reflect local market conditions that are consistent with the Act.[86] In an effort to frustrate the pro-competitive unbundling rulings adopted by the state commissions, the ILECs posit that the states should be preempted from expanding unbundling obligations beyond the level required by the Commission.[87]

The ILECs' position is nothing more than a further attempt to circumvent their obligations under the Act. As succinctly stated by the Public Utility Commission of Texas, they remain in the best position to recognize the characteristics of markets and incumbent carriers

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[85] 47 C.F.R. § 51.317(b)(4) ("[a] state commission must comply with the standards set forth in this §51.317 when considering whether to require the unbundling of additional network elements.")

[86] *See* Comments of the California Public Utility Commission at 22; Comments of the Florida Public Service Commission at 6; Comments of the Georgia Public Service Commission at 3; Comments of the Illinois Commerce Commission ("ICC Comments") at 2; Comments of the Indiana Utility Regulatory Commission at 5; Comments of the Kansas Corporation Commission at 4; Comments of the Louisiana Public Service Commission at 2; Comments of the Massachusetts Department of Telecommunications and Energy at 3; Comments of the Michigan Public Service Commission at 4; Comments of NARUC at 6; New York DPS Comments at 8; Comments of the Ohio Public Utility Commission at 8-10 and 14; Comments of the Oklahoma Corporation Commission at 5; Comments of the Pennsylvania Public Utility Commission at 5; Comments of the Texas Public Utility Commission ("Texas PUC Comments") at 2.

[87] *See* SBC Comments at 40-42; Verizon Comments at 64-65; Qwest Comments at 10.

within Texas, and the entry strategies that have worked best.[88] Moreover, as described by the Illinois Commerce Commission, removing UNEs from the list and revising unbundling rules would undermine the competitive progress the state commissions have achieved to date and frustrate the continuing efforts to foster a competitive local exchange market.[89]

This sentiment is echoed by the State of New York, whose pro-competitive rulings over the past several years have served as a model for fostering a competitive landscape in other states. As the New York Department of Public Service points out, "the level of competition in each state is directly affected by which UNEs are available in that state . . . [t]he analysis to determine which UNEs should be unbundled in a state is fact specific and must consider conditions in each particular market."[90] For instance, notwithstanding that this Commission determined that local switching is not necessary to serve business customers with 4 or more lines, New York determined that small business customers – which is defined in New York as customers serving 18 lines or less – should be treated the same as residential customers, thereby extending CLECs' access to the UNE-P to business customers serving 18 lines.[91] The local competitive environment in New York mandated this decision, which should not be disturbed by the Commission.

For these reasons, the Commission should adhere to its existing policy of fostering "an interactive process by which a number of policies consistent with the 1996 Act are generated by

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88 Texas PUC Comments at 2.

89 *See* ICC Comments at 2. For instance, as a condition of merger approval in the State of Illinois, the Illinois Commerce Commission required Ameritech-Illinois to provide the same shared transport offering that Southwestern Bell Telephone provided in Texas. A change in policy at the FCC with regard to interoffice facilities could therefore have a dramatic impact on the pro-competitive efforts of the ICC in Illinois. *Id.*

90 New York DPS Comments at 8.

the states."[92] Specifically, if the Commission determines to exclude high-capacity loop and dedicated transport from its UNE list, the Commission must keep open the door to allow the states, based on local market conditions and in accordance with the Act, to continue to require the unbundling of these UNEs in their states. Only in this way will the greatest competitive benefits be brought to bear upon the American public.

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91 *Id.*

92 UNE Remand Order at ¶¶ 153-159.

III. CONCLUSION

For the foregoing reasons, the Commission should continue to mandate the unbundling of the loop, high-capacity loop and dedicated transport network elements pursuant to Section 251(c)(3) of the Act.

Respectfully submitted,

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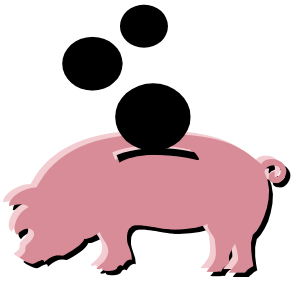
July 17, 2002

Exhibit 1

SBC's Special Access vs. UNE PowerPoint Presentation

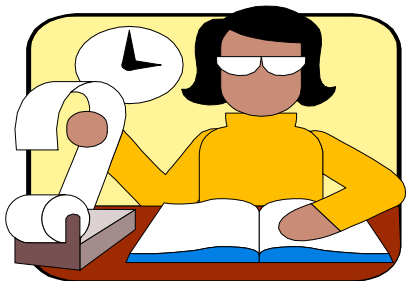
Special Access vs. UNE's
Does It Really Add up?



Current Scenario

Customer calls in to their local account manager to order a T3 in the Chicago exchange

The AM quotes the rate at $686.47 and helps them to process their order



Special Access vs. UNE's
Does It Really Add up?

UNE Rate				
$686				

Alternative Scenario

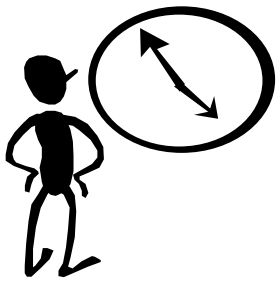
- Customer calls in to their local account manager to order a T3 in the Chicago exchange
- The AM does a little bit of fact finding to find out how the circuit will be used
- The local AM makes the customer aware that there is a higher grade of service available where customers enjoy:

Reduced Installation Times

- Special access T3's can be installed in as quickly as 15 days when a customer signs up for our NVAT program
- If we miss our firm order commit (FOC) date for installation we credit the nonrecurring charges
- UNE T3 installation intervals typically can run 15 to 30 days

Quicker Repair Intervals

For outages of more than 4 hours a credit for the monthly charge is posted to the account



Service Level Guarantee

Special access T3's have service level guarantees of 98.75% availability for copper and 99.999% availability for fiber service

Cost

Special access products are in most cases, very comparable in price to UNE's – why pay for a lesser quality service

Special Access vs. UNE's
Does It Really Add up?

$685	$1,200	$786	$579	$106

Term Discounts

Customers can receive a discount off the month-to-month rate if they are willing to commit to an extended term. In most regions, they can purchase for:

- 1 year
- 3 year
- 5 year (installation fees are waived)

Optional Discount Plans

The terms discounts that the customer can choose from are available via the various optional discount plans that we offer. These plans vary region by region but in general they provide:

- Discounts of around 6%-60% off of the tariffed monthly cost of the circuit

Special Access vs. UNE's

Does It Really Add up?

UNE Rate	Special Access Month-to-Month Rate	Monthly Cost Under a 5 Year Term Discount	MVP/FLEX	OC12 MVP
$686	$1,250	$960	$836	$632

Price Flex or MVP Plans

There are two new calling plans that provide even greater discounts to our customers. These discounts are in addition to the discounts already discussed

For customers who are considering flipping their access circuits to UNE's, price flex is an option where we can discount their circuits up to an additional 19%

Price Flex

Regional Bands	Regional Annual Revenue (SPAC and SWAC Transport Regional Annual Spending)	(Option 1) Discount Applied to Eligible Access-to-UNE Circuits	(Option 2) Regional Annual Revenue Commitment Discounts Applied to Eligible Access-to-UNE Circuits
1	$1 - 1.99M	8%	3%
2	$2M – $5.99M	10%	5%
3	$6M - $9.99	12%	7%
4	> $10M	0% (convert to MVP)	0% (convert to MVP)

Price Flex Terms & Conditions

Customer has two options for obtaining discounts

5 year commitment

Customer must maintain a 95% access-to-UNE ratio per region

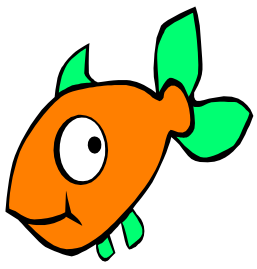
Available to certified carriers that have Access-to-UNE certified and validated circuits

Discounts only apply to Access-to-UNE eligible circuits within price flex eligible MSA's

Managed Value Plan (MVP)

Once a customer exceeds $10M in billing within a particular region, they are automatically switched over to MVP where their entire embedded base is then discounted at:

- Year 1 = 9%
- Year 2 = 11%
- Year 3 = 12%
- Year 4 = 13%
- Year 5 = 14%



Special Access vs. UNE's
Does It Really Add up? T-1 Example

UNE Rate	Special Access Month-to-Month Rate	Monthly Cost Under a 3 Year Term Discount	Monthly Cost inc. Price Flex Discount	
$108	$137	$129	$115	

Additional Advantages

Customers pay to have their entrance facilities built for local loops

In the special access world, we install the entrance facilities at no charge

Customers pay to convert their circuits over from special access to UNE's (typically around $1,700 per circuit based on the interconnection agreement)

Summary

When you add it all up, Special Access can be extremely competitive with local circuits and in some cases, even less expensive

UNE Rate	Special Access Month-to-Month Rate	Monthly Cost Under a 3 Year Term Discount OC3	Monthly Cost inc. Price Flex Discount	Difference in Special Access vs. UNE
$686	no	$1,026	$840	$154

Summary

Special access provides shorter installation times

Special access provides shorter repair intervals

Special access has service guarantees

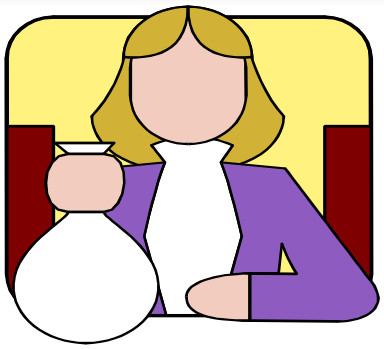
Special access is cost competitive

No costs for DEF with special access

Special Access vs. UNE's

Does It Really Add up?

Heck Ya!



CERTIFICATE OF SERVICE

I, Jane L. Hall, hereby certify that I have caused a copy of the foregoing "Reply Comments of XO Communications, Inc.," in CC Docket Nos. 01-338, 96-98 and 98-147 to be served on this 17th day of July 2002, via hand delivery, upon the following:

Michael K. Powell, Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Kathleen Q. Abernathy, Commissioner
Federal Communications Commission
445 Twelfth Street, SW
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Michael J. Copps, Commissioner
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_____/s/_____
Jane L. Hall